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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

JOY REYNA BENHAM,

Plaintiff and Respondent,

v.

SENATOR FORD, INC.,

Defendant and Appellant.

C058038

(Super. Ct. No.
03AS00156)

A jury awarded plaintiff Joy Reyna Benham damages arising from the injuries she sustained to her neck from a rear-end collision, but not from the back problems that were treated nine months later. The driver who rear-ended plaintiff admitted the accident was his fault. Defendant Senator Ford, Inc. (Senator Ford) contends the trial court abused its discretion by disallowing evidence of two other accidents—one 20 years earlier and one three years after the rear-end collision. Senator Ford also contends the verdict was inconsistent and the damages were excessive. Finding no abuse of discretion, an inconsistent verdict, or excessive damages, we affirm.

FACTS

Plaintiff's Injuries and Treatment Following the Collision

Around 8:00 a.m. on March 5, 2002, Walter Welch was delivering parts for his employer, Senator Ford, when the Ford F-150 pickup truck he was driving rear-ended a 1993 Toyota Camry stopped at a red traffic signal. Plaintiff, the 54-year-old driver of the Camry, was en route to her full-time job at Travelers Insurance. The force of the collision pushed the Camry through the crosswalk. Welch apologized to plaintiff for causing the collision. They drove their vehicles to a safe place and exchanged contact information. Plaintiff then drove herself to work.

Shortly after arriving at work, she experienced considerable pain in her ears, and before long she developed a searing headache. She scheduled an appointment with her primary care physician at Kaiser for 5:00 that afternoon. At that appointment, she complained of excruciating pain in her neck, head, upper back, and torso. Her doctor diagnosed a neck sprain and prescribed rest, ice, stretching, and muscle relaxing and anti-inflammatory medications.

Plaintiff's condition worsened. Her primary care physician referred her to physical therapy to treat her cervical spine complaints. On a diagram plaintiff illustrated for the physical therapist, she indicated she was suffering pain all along her spine, including the lumbar region. The physical therapist described the symptoms of paresthesia—sensations of pins and

needles and tingling in the arm—likely referable to a disk compressing a nerve in the cervical spine.

Plaintiff continued to see her primary care physician and the physical therapist through the spring of 2002. In May her primary care physician referred her to pain management, which consisted of acupuncture, and prescribed additional pain and anti-inflammatory medication. Believing this doctor had given up on her, plaintiff moved to another Kaiser facility to get additional advice.

On July 29, 2002, she complained to a different Kaiser doctor at the other Kaiser facility of posterior neck pain radiating down her left arm. This doctor concluded that plaintiff suffered from cervical disk-caused radiculopathy and believed, with reasonable medical probability, the condition was caused by the 2002 accident. She too prescribed the same medications. This doctor treated plaintiff again on November 18, 2002, for “[p]ersistent cervical and upper back pain radiating down [left] arm.”

Meanwhile, on October 23, 2002, plaintiff saw a specialist in physical medicine and rehabilitation. Plaintiff complained that her neck problem was affecting her work. The specialist performed an EMG (electromyography) that showed evidence of nerve damage originating from her neck.

Plaintiff complained of buttock and leg pain for the first time to her new internist on December 9, 2002. The physical medicine and rehabilitation specialist then began treating plaintiff for lumbar pain as well as cervical pain. Pain in

both regions precluded her from working. The specialist testified he could state with medical certainty that the cervical, lumbar, and thoracic disk problems were caused by the March 2002 rear-end collision.

In June 2003 plaintiff sought the advice of a neurosurgeon outside the Kaiser network, who, unlike the surgeons at Kaiser, performed minimally invasive surgery. He treated her for both neck and back pathology and ultimately performed lumbar surgery in November. He opined that, within the bounds of reasonable medical probability, the 2002 accident caused plaintiff's cervical and lumbar spine problems. By January 2004 plaintiff's lumbar spine was significantly better, but her cervical spine remained extremely painful. This surgeon, like the physical medicine and rehabilitation specialist, did not believe plaintiff exaggerated her symptoms.

Plaintiff can no longer work because of her neck pain and the medications she takes for that pain. Her neurosurgeon testified it is highly probable that she will need neck surgery, but he is waiting to perform the surgery until the necessary prosthetic disks have been improved.

Plaintiff Before the Collision

A month before the accident, plaintiff's rheumatologist recorded that plaintiff had a 30-year history of recurrent mild low-back pain and concluded she had degenerative disk disease, an age-related progressive condition where the disks in the spine dry out, become brittle, tear, and sometimes rupture.

Plaintiff had many urinary tract infections that also caused low back pain. In 1992 she suffered a shoulder injury in a car accident but did not experience any back or neck pain. She testified she had no preexisting neck problems in the 10 years preceding the 2002 collision, no thoracic problems, and minimal lumbar problems that were unrelated to urinary tract infections. Plaintiff and one of her coworkers at Travelers Insurance testified that before the collision she had a vibrant social life and loved her job. Since the collision her chronic pain has made socializing and working impossible.

Dueling Experts

Plaintiff and defendant both hired doctors and engineers to opine on whether the rear-end collision caused plaintiff's cervical and lumbar injuries. As mentioned above, plaintiff's treating physicians testified the collision caused her injuries. Additionally, a neurosurgery expert for plaintiff opined that the injuries to her cervical spine, lumbar spine, and thoracic spine were all because of the 2002 accident. An accident reconstruction engineer opined that the Ford truck was traveling at a speed of approximately 23 miles per hour when it struck plaintiff's Camry.

Defendants' medical experts testified there was no relationship between plaintiff's injuries and the accident. According to a defense neurologist, plaintiff's history of episodic back pain and disk herniation is because of degenerative disk disease, not the accident. Defendant's biomechanical engineer opined that the Ford pickup truck was

traveling 5 miles per hour at the point of impact and testified there "is no way" the damage to plaintiff's Camry is consistent with an impact speed of 23 miles per hour. She also testified that the forces produced in the accident were insufficient to cause herniation in the spine.

The Jury Verdict

The jury found that Senator Ford was negligent and its negligence was a substantial factor in causing plaintiff injury. The jury awarded plaintiff \$229,590 for past lost earnings, \$108,675 for future lost earnings, \$4,348.55 for past medical expenses, \$89,342 for future medical expenses, and \$68,832 for pain and suffering. Senator Ford appeals.

DISCUSSION

I

Evidentiary Error

In motions in limine, plaintiff sought to exclude evidence of three accidents in which she was involved before the rear-end collision, and of another automobile accident that occurred three years later. The trial court granted the motions to exclude a 1982 accident that occurred 20 years before the rear-end collision and the accident that occurred in 2005 after the rear-end collision, but admitted evidence of two accidents that occurred in the 1990's. Senator Ford unsuccessfully challenged the adverse evidentiary rulings in its motion for a new trial.

Senator Ford contended before and after trial, as it does on appeal, that the evidence of other accidents was substantially more probative than prejudicial. Senator Ford

insists that once a proverbial "eggshell" plaintiff places her preexisting condition at issue with a claim, like here, that she is more vulnerable to injury, her past physical condition becomes relevant. As to the 1982 accident, Senator Ford argues that plaintiff had been struck from behind and had experienced pain in her neck and low-back pain radiating down her extremities. Moreover, it maintains it should have been allowed to introduce evidence of the serious accident in which plaintiff was involved three years after the rear-end collision in this case because it was relevant to rebut her claim that a preexisting condition made her unduly susceptible to injury. Senator Ford, of course, must demonstrate not only that the evidence was relevant, but also that the trial court abused its discretion by excluding the evidence under Evidence Code section 352.

Evidence may be excluded pursuant to Evidence Code section 352 if its probative value is outweighed by the probability that its admission will create a substantial danger of undue prejudice, confusing the issues, misleading the jury, or requiring an undue consumption of time. Admissibility of evidence is left to the sound discretion of the trial court, a discretion that is abused only when it "exceeds the bounds of reason, all of the circumstances before it being considered." (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.) "[T]he term judicial discretion implies absence of arbitrary determination, capricious disposition, or whimsical thinking. It imports the exercise of discriminating judgment within the

bounds of reason. To exercise the power of judicial discretion, all the material facts must be known and considered, together also with the legal principles essential to an informed, intelligent and just decision. [Citation.]'" (*Todd v. Thrifty Corp.* (1995) 34 Cal.App.4th 986, 990 (*Todd*).) Senator Ford bears the burden of demonstrating the trial court's exclusion of evidence constitutes a clear abuse of discretion that resulted in a miscarriage of justice. (*Denham, supra*, 2 Cal.3d at p. 566.) It falls miserably short of sustaining that burden.

The trial court admitted evidence of two prior accidents, but excluded the one that was 20 years old as too remote in time to be relevant. Plaintiff was treated briefly for three months at Kaiser following the 1982 car accident. There was but one entry in her medical record referencing neck pain, and that was resolved by the next appointment. There was no further mention of neck pain for the following 20 years. Moreover, defendant did not produce evidence about the circumstances surrounding that accident, such as the speed of the vehicles, what kind of vehicles were involved, and the identity of the other parties. There is no evidence plaintiff filed any claim or suffered any further discomfort as a result of the accident. We cannot say the trial court abused its discretion by excluding evidence of such a remote and minor occurrence.

Nor do we agree with Senator Ford that the exclusion of the evidence hamstrung the defense by eliminating a fertile area in which to demonstrate the scope of her preexisting injuries and to discredit her. First, we point out the court did allow an

exhaustive examination of 16 years of medical records and did allow evidence of two accidents that occurred during the 1990's. As a result, the jury was presented with an in-depth accounting of plaintiff's medical condition, including the details of both another car accident and a slip-and-fall accident.

Second, we reject Senator Ford's notion that plaintiff's failure to recall when she answered the interrogatories that she had mentioned neck pain once to a doctor 20 years earlier would have had any material effect on the jury's assessment of her credibility, even if, as Senator Ford points out, she had a 30-year history of mild low-back pain. The one-time mention of neck pain bears no relation to the lumbar discomfort she suffered over the years, some of which was associated with a pattern of urinary tract infections. Nor would the failure to recall the fleeting discomfort have transformed her into a malingerer, in either the eyes of her treating physicians or of the jurors.

Third, *Prichard v. Veterans Cab Co.* (1965) 63 Cal.2d 727, cited by Senator Ford, is not only old but easily distinguished, as the *Prichard* court allowed the admission of evidence of an accident that occurred two, not twenty, years earlier. (*Id.* at p. 733.) Here we conclude that unlike the court in *Prichard*, the trial court's measured exclusion of one very old prior accident was not the type of "arbitrary determination, capricious disposition, or whimsical thinking" necessary to find an abuse of discretion. (*Todd, supra*, 34 Cal.App.4th at p. 990.)

Evidence that plaintiff was engaged in another car accident three years after the rear-end collision requires a similar analysis. We must determine whether the trial court abused its discretion by excluding evidence of the 2005 accident because it would "involve an undue consumption of time and a strong likelihood of confusing the jury. The evidence would have little or no probative value since the existence of plaintiff's pre-existing condition is largely a matter of medical expert testimony."

Senator Ford claims the circumstances involved in the subsequent accident discredit plaintiff. Because the car was totaled, Senator Ford maintains plaintiff must have been untruthful in claiming she had not been injured, and if she was not hurt as she claimed, she was not susceptible to injury as she alleged in her complaint against Senator Ford.

In assessing whether the trial court abused its discretion by excluding the evidence, it is helpful to consider the relevant time frame. The rear-end collision occurred in March 2002. For nine months she was treated for cervical pain, and although there was some documentation about lower-back pain, the treatment was focused on her neck. In December 2002 she began to complain of increasing pain in her lumbar region, escalating to a point that in November 2003 she required lumbar surgery. By January 2004 her back condition had stabilized, but her cervical condition precluded her from working, remained extremely painful, and, in her surgeon's estimation, would require surgery in the future. Thus, as plaintiff points out,

her medical condition was well documented before she was involved in yet another car accident in 2005. What injuries she suffered several years after the rear-end collision would have had minimal probative value.

Yet, as the trial court recognized, admitting the evidence of the 2005 accident presented considerable risk of confusing the jury, creating undue bias, and consuming a disproportionate amount of trial time. Although the record does not disclose any evidence that the 2005 accident had been reconstructed or analyzed, admission of evidence of this accident would have required biomedical and accident reconstruction of a completely different collision involving side impact. Senator Ford sought to establish that the extent of the damage to the car was far greater in the 2005 accident, and consequently, plaintiff should have been more seriously hurt. The trial judge aptly queried: "Well, how do you have the jury evaluate which of the two accidents was more serious? By property damage? By speed of impact? By the condition of the roadway? Where was she seated? . . . [¶] [W]hen you're getting into the qualitative difference between the accident in question and this one that occurred three years later, you're really asking the jury to go into a dark forest." We cannot say the trial court abused its discretion by preventing the trial from devolving into a trial within a trial.

But Senator Ford insists it would have asked only a few questions that would not have consumed a significant amount of trial time. The court, however, could have reasonably

determined that admission of the subsequent accident would have required plaintiff to demonstrate the differences between the two accidents and justify why she escaped injury in the subsequent accident while suffering debilitating cervical and lumbar injuries from the rear-end collision. Moreover, there was a risk the jury would have used the 2005 accident to attribute fault to plaintiff for the earlier rear-ender when the driver had already conceded fault.

As a result, although the probative value of the 2005 accident was minimal, the risk of confusion and prejudice was substantial. There may have been any number of reasons plaintiff was not injured in the 2005 accident, whether or not she was more susceptible to injury than a younger person. Exploration of those reasons would have, as the court properly determined, involved considerable time, and the court correctly questioned to what end. On this record, we can find no abuse of discretion.

II

The Verdict

Upset that the jury awarded \$229,590 in past lost earnings when it awarded only \$4,348.55 for past medical expenses, Senator Ford next contends that the jury verdict was fatally inconsistent and the damages were excessive. Plaintiff does not challenge the basic legal principles that a jury may not make inconsistent determinations premised on the same evidence and that a damage award must be supported by substantial evidence and therefore must not be so grossly disproportionate as to

raise a presumption it was based on passion or prejudice. (*Cavallaro v. Michelin Tire Corp.* (1979) 96 Cal.App.3d 95, 101; *Cunningham v. Simpson* (1969) 1 Cal.3d 301, 308-309.) She does, however, argue the verdict was consistent and the damages were supported by the record.

The parties stipulated to past medical expenses, but although they distinguished different time periods, they did not distinguish the expenses related to plaintiff's cervical spine from those associated with her lumbar region. They stipulated the past medical expenses between March 5, 2002, and May 17, 2002, were \$4,348.55, and those between March 5, 2002, and October 1, 2007, were \$166,843.97. The jury awarded only those medical expenses occurring between March 5 and May 15.

Similarly, the parties stipulated that plaintiff's wage loss from March 5, 2002, to May 17, 2002, was \$3,735.15. Plaintiff's economist testified that her total past wage loss from December 23, 2002, until the time of trial was \$229,590. The jury awarded damages consistent with plaintiff's expert testimony for a past wage loss of \$229,590.

In denying Senator Ford's motion for a new trial, the trial court expressly upheld the damage award, explaining: "Defendant contends that the damages award for past wage loss of \$229,590.00 is excessive in light of the award of \$4,348.55 for past medical expenses. It argues the awards are inconsistent and not supported by the evidence. The Court disagrees. The Court has independently reviewed all of the evidence presented. There was ample evidence in the record to support the amount of

damages awarded. The two amounts are neither inconsistent nor hopelessly [ir]reconcilable." We agree.

Senator Ford's argument hinges on its assumption that the disparity between the past medical expenses and the lost income reflects an irreconcilable inconsistency. In Senator Ford's view, the jury could not have awarded damages for lost income during the same time period it rejected damages for medical expenses. In other words, if the jury found plaintiff was only entitled to her medical expenses immediately following the rear-end collision, it could not award her lost income for the substantial time period following her complaints about her back. Not so.

The medical expenses incurred from March through May of 2002 were a result of plaintiff's cervical pain. Her complaints immediately following the accident primarily related to her neck, and she was not treated for her lower back pain until December. It is true that by December, if not before, her complaints about her cervical and lumbar spine overlapped. While the primary focus may have shifted from her neck to her back, there is no evidence the injuries to her neck dissipated. Rather, the pain associated with her neck appears to have been a constant, even though the pain associated with her herniated disks may have camouflaged the pain in her neck until she had successful lower back surgery in 2003.

Senator Ford argued to the jury that the rear-end accident did not cause plaintiff's injuries. It emphasized that plaintiff had a 30-year history of low-back pain and had been

diagnosed with degenerative disk disease a month before the March 5 collision. Given her history of back disease and the fact plaintiff did not seek treatment for her lower back until nine months after the accident, there was substantial evidence to support the jury's verdict that the collision caused the neck injury but not the injury to her lower back. Yet there was compelling testimony the neck pain persisted after the lumbar disks were surgically addressed.

Plaintiff points out that while the medical expenses incurred from March to May were attributable solely to her neck pain, the medical expenses presented to the jury that were incurred after December did not differentiate expenses for treating her back, including surgery, from those expenses related to her ongoing neck problems. Aware that the cost of the surgery would have been formidable and without any breakdown between the expenses arising from the back and those arising from the neck, the jury chose to award only the medical expenses that were exclusively attributable to the neck. The jury also awarded the projected cost of the future neck surgery her surgeon and other medical experts testified would be necessary for her to get the kind of pain relief she would need to be able to return to work. Thus, ample evidence supported the jury's implied finding that plaintiff's neck problems were a substantial factor in disabling her from the work force.

We conclude, therefore, the award of damages was neither inconsistent nor grossly disproportionate. Rather than a jury ignited by passion or prejudice, the record portrays a

discriminating jury determined to award plaintiff the damages caused by the rear-end collision but nothing more. The verdict reflects that the jurors awarded plaintiff \$89,342 for the cost of a future four-disk neck surgery; \$229,590 for past lost wages as supported by the testimony of plaintiff's doctors and economist; \$108,675, which was precisely one-half of the future wage loss requested; and \$68,832 for the past, but not future, amount of pain and suffering. Plaintiff's testimony alone supports a substantial award for pain and suffering as the quality of her life has diminished significantly since the rear-end collision. As the trial court found, the record supports the jury damages award.

DISPOSITION

The judgment is affirmed.

RAYE, J.

We concur:

BLEASE, Acting P. J.

CANTIL-SAKAUYE, J.